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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 905

EDWARD ABERNATHY et al.,
Appellants,

vs.

MILTON CARPENTER, Director of Revenue for the State of Missouri,
Appellee.

ON APPEAL FROM A DECISION OF A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION.

SEPARATE MOTION TO AFFIRM OR ALTERNATIVE MOTION TO DISMISS OF APPELLEE, MILTON CARPENTER, DIRECTOR OF REVENUE FOR THE STATE OF MISSOURI.

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ON APPEAL FROM A DECISION OF A THREE JUDGE COURT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, CENTRAL DIVISION.

SEPARATE MOTION TO AFFIRM OR ALTERNATIVE MOTION TO DISMISS OF APPELLEE, MILTON CARPENTER, DIRECTOR OF REVENUE FOR THE STATE OF MISSOURI.

Milton Carpenter, Appellee, in the above entitled cause, pursuant to Rule 16 of the revised rules of the Supreme Court of the United States, moves that the order of the three judge court of the United States District Court

for the Western District of Missouri, Central Division, dismissing this proceeding at appellants' costs, be affirmed, or, in the alternative, that the appeal herein be dismissed, on the following grounds:

1. The Court below properly dismissed this proceeding.

A. The requisite jurisdictional amount is not present in this case.

B. This cause does not fall within the purview of 28 USCA §1343(3).

C. The appellants have a plain, speedy and efficient remedy at law within the meaning of 28 USCA §1341.

D. The Motion to Dismiss was sustained as a proper exercise of the Court's discretion.

STATEMENT.

Appellants are a large number of Illinois residents who brought suit against the Director of Revenue for the State of Missouri pursuant to 28 USCA §2281 and §2284. The purpose of this suit was to enjoin the appellee, Director of Revenue, from collecting, or attempting to collect, certain Missouri State Income Taxes from appellants, and from assessing or attempting to assess civil and criminal penalties for failure to file Missouri State Income Tax returns.

Section 143.170, RSMo 1959, provides in part that nonresidents earning taxable income in Missouri can receive the benefits of their personal exemptions only by filing a timely return with the Director of Revenue of Missouri. It was stipulated by the parties to this proceeding that

the appellants failed to file returns and, as a result, that they had assessments for income taxes made against them allowing one exemption for each appellant whether he may, or may not, have been entitled to more.

It is the allegation of appellants that the Missouri Income Tax Statute (143.170, *supra*) violates the privileges and immunities clause of Section 2, Article IV of the United States Constitution and also the due process and equal protection clauses of the 14th Amendment of the United States Constitution.

The three judge court, after a hearing held August 20, 1962, dismissed this proceeding for want of federal jurisdiction in an opinion dated September 14, 1962. This opinion is reported in 208 Fed. Supp. 793. Appellants have appealed to this Court on the authority of 28 USCA §1253 which provides that appeals from the findings of a three judge court shall be to the United States Supreme Court.

ARGUMENT.

The Court Below Properly Dismissed This Proceeding.

A. The requisite jurisdictional amount is not present.

One of the alleged grounds of Federal jurisdiction contended by the appellant is under the authority of 28 USCA §1331 in that there is a constitutional question involved under the pleadings in this case. However, there is no showing that the requisite jurisdictional amount of $10,000 is in controversy. It is apparent that none of the appellants individually can attain the requisite jurisdictional amount.

As noted by the court below, 208 Fed. Supp. 793, l.c. 796-797:

"In any individual plaintiff's situation in the case at bar it can be demonstrated that the sum any plaintiff would be entitled to in interest would be so small to be inconsequential. Take for example a plaintiff having a spouse and ten dependents. Such a person would be entitled to $6,400 in exemptions. Assuming that such person was in the highest income tax bracket his rate of income tax would be 4 per cent, under § 143.010, RSMo (1959), V.A.M.S. If these exemptions were denied the taxpayer, he would be subjected an additional tax of $256.00. At a rate of interest of 6 per cent on this additional tax, the state would only be assessed a sum of $15.36 per annum in the event that the taxpayer's protest procedure was successful and the statute in question declared unconstitutional. * * *"

There is no contention made by appellants that any individual taxpayer has an amount in controversy in excess of $10,000.

It is also apparent that appellants cannot aggregate their claims to arrive at the requisite jurisdictional amount. Rule 23 of the Rules of Federal Procedure deals with class actions. This action falls within the category of "a spurious class action" in which the claims cannot be aggregated. *Moore on Federal Practice*, Vol. III, Sec. 23.13, page 3482. See also *Tittle et al.* v. *General Motors Corporation*, 80 Fed. Supp. 333, l.c. 334; *Greater Hartford Free Bridge Association* v. *Greater Hartford Bridge Authority*, 172 Fed. Supp. 244, and *Sesler* v. *Union Local 901*, 186 F.2d 403. *Annotation 30 ALR2d* 602, l.c. 658. In the case of *Travis v. Yale & Towne Mfg. Co.*, (1926) 252 U.S. 60, 64 S. Ct. 228, cited by appellants (page 8 App's Brief) the requisite jurisdictional amount (then $3,000) was expressly found to be present. 252 U.S. 60, l.c. 74, 75.

We submit that this cause was properly dismissed because the amount in controversy is not sufficient to invoke Federal jurisdiction.

B. This cause does not fall within the purview of 28 USCA §1343(3).

The appellants in this proceeding further allege there is Federal jurisdiction under the authority of 28 USCA § 1343(3), the Civil Rights Act. It is true that the requisite jurisdictional amount is not necessary under a proceeding falling within the purview of this act. *Hague* v. *C.I.O.*, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1028. However, it is submitted by the appellee that the Court below properly ruled that this proceeding involved property rights as opposed to "personal liberty" and that therefore § 1343(3) is inapplicable to this proceeding. *Hague* v. *C.I.O., supra.*

Appellants rely on *Schlosser* v. *Welsh*, 5 Fed. Supp. 993. This case was decided by the District Court of South Dakota in the year 1934. The case of *Hague* v. *C.I.O., supra*, was decided in 1939 and the conflict, if any, between the cases was therein resolved. The District Court of Maryland in the case of *Reiling* v. *Lacy*, 93 Fed. Supp. 462, considered this point, l.c. 466, 467 and stated:

> "But the prayer for alternative relief is essentially a taxpayer's suit to protect the plaintiff from being required to pay allegedly unlawful taxes and, therefore, of course, relating only to his property and not to a personal constitutional right. Federal jurisdiction of a suit of this nature falls under subsection (1) (a) of section 41 of Title 28 which requires a showing that the amount in controversy exceeds $3,000. * * *"

See also *Holt* v. *Indiana Mfg. Co.*, 176 U.S. 68, 72, 20 S. Ct. 272, 273, 44 L. Ed. 374. Appellees therefore submit

that this cause does not fall within the purview of 28 USCA § 1343(3), and therefore, the requisite jurisdictional amount must be present in order to invoke federal legislation.

C. Appellants have a plain, speedy and efficient remedy at law within the meaning of 28 USCA §1341.

This cause was properly dismissed by the Court below because appellees have a plain, speedy and efficient remedy within the meaning of Title 28, USCA § 1341 which provides:

> "The District Courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state."

All the appellants herein failed to file Missouri State income tax returns as required by law. Section 143.010, RSMo 1959. The Director of Revenue made an assessment and notified the taxpayers of the assessment under the authority of Section 143.230, RSMo 1959. Under Missouri statutes an aggrieved taxpayer may petition for abatement, correction or reassessment. Section 143.250, RSMo 1959. The taxpayer may further appeal an adverse decision of the Director of Revenue to the State Tax Commission, whether he petitions for an abatement, correction or reassessment or not. Section 143.260, RSMo 1959. The taxpayer may also appeal the judgment of the Tax Commission to the Courts of the State of Missouri. Sections 148.070, 536.100 to 536.140, RSMo 1959. The appellants in this case did not petition for abatement, correction or reassessment but allowed the period for administrative review to lapse and thereby become final.

Under the stipulated facts in this proceeding, upon the failure of these appellants to file their tax returns, the

Director of Revenue made an assessment allowing one exemption to each taxpayer. Paragraph 7, Stipulation of Facts.

It is not affirmatively shown by the appellants that the Director of Revenue does not use the same yardstick on residents and non-residents in making such an assessment. On the contrary it is affirmatively shown that the Director of Revenue allowed these appellants one exemption which he is not required to do under the statute here in controversy, Section 143.170, RSMo 1959. The taxpayer, be he resident or non-resident, cannot collaterally attack this arbitrary assessment once the period for administrative review has passed.

In the recently decided case of *State* v. *Kosovitz*, Mo. S. Ct., 342 S.W.2d 828 (1961), the reassessment for income tax was attacked in a court proceeding as "illegal and void" after the period for administrative review had passed. This reassessment had allegedly failed to allow certain deductions to which the resident taxpayer-plaintiff was entitled. The Missouri Supreme Court held that the taxpayer had failed to exhaust his administrative remedies and the reassessment was therefore not subject to collateral attack. The Court specifically noted, l.c. 832:

> "* * * If he (the Director of Revenue) erroneously disallowed deductions, a matter which we do not rule, his actions were merely erroneous, not jurisdictional, and they were not void." (Parenthetical material added)

So also in the case now before this Court, the appellants allowed their time for administrative review to elapse and under the directive announced in the *Kosovitz* case, *supra*, they cannot now collaterally attack this assessment. See also the case of *Bucklin Coal Mining Company*

v. *Unemployment Compensation Commission*, 53 Fed. Supp. 434 (D.C. W.D. Mo., 1943), noted by the Court below.

The fact these appellants did not avail themselves of the administrative review available to them under the Missouri statutes, *supra*, does not entitle them to now assert there is no plain, speedy, efficient remedy within the meaning of 28 USCA 1341. In *Reiling* v. *Lacy*, 93 Fed. Supp. 462, 467[6], the District Court of Maryland stated:

> "It is conceded in the present case that, as plaintiff claims, the procedure afforded by Maryland law for contesting the validity of a tax is now unavailable to him because more than three years have elapsed since the date on which his income tax returns for the years here in question should have been filed. But plaintiff goes further and claims that, although the Maryland income tax law provides for notice and right of appeal to the State Tax Commission, he has not been given any right of appeal or any other reasonable opportunity to be heard. However, this is not in fact true. *The plaintiff did have both a right of review and a right of appeal to the State tribunals but failed to take advantage of these rights.*" (Emphasis supplied).

Appellee therefore submits that the appellants did have a plain, speedy and efficient remedy available to them under Missouri statutes and cannot now complain because they failed to take advantage of the review provided by Missouri statutes.

D. The Motion to Dismiss was sustained as a proper exercise of the Court's discretion.

It is further submitted that the Motion to Dismiss was properly sustained by the Court below in the proper exercise of the Court's discretion in this declaratory judgment action.

In the case of *Great Lakes Dredge and Dock Co.* v. *Huffman*, 319 U.S. 293, 63 S. Ct. 1070, 87 L. Ed. 1407, the petitioners brought a declaratory judgment action in the Federal Court, seeking to declare the Louisiana Unemployment Compensation Law unconstitutional and void. The District Court found the statute constitutional and dismissed the complaint. The Court of Appeals affirmed the findings of the District Court. The United States Supreme Court held that the judgment of dismissal should be affirmed, but "solely on the ground that, in the proper exercise of the Court's discretion, relief by way of declaratory judgment should have been denied without consideration of the merits", l.c. 301, 302. The United States Supreme Court noted at 300, 301:

> "The considerations which persuaded federal courts of equity not to grant relief against an allegedly unlawful state tax, and which led to the enactment of the Act of August 21, 1937, are persuasive that relief by way of declaratory judgment may likewise be withheld in the sound discretion of the court. With due regard for these considerations, it is the court's duty to withhold such relief when, as in the present case, it appears that the state legislature has provided that on payment of any challenged tax to the appropriate state officer, the taxpayer may maintain a suit to recover it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the same time leaves undisturbed the state's administration of its taxes."

In the facts before this Court, the appellants were afforded an opportunity to contest the assessment without the payment of the challenged taxes, *Abernathy* v. *Carpenter*, 208 Fed. Supp. 793, 797. By means of the review procedures available they could also, as in the *Great Lakes Dredge & Dock Company* case, *supra*, have been afforded

a review by the United States Supreme Court. It is also to be noted that the required jurisdictional amount was not in dispute in the *Great Lakes Dredge & Dock Company* case, *supra*.

The above reasoning was followed in the case of *Bucklin Coal Mining Company* v. *Unemployment Compensation Commission, supra*. See also *Reiling* v. *Lacy, supra*.

It is also worthy of consideration that the Missouri Supreme Court has never had an opportunity to pass on the import of Section 143.170, RSMo 1959. In the case relied on by appellants, *Stouffer* v. *Crawford*, Mo. S. Ct., 248 SW 581 (1923), the constitutionality of the Missouri income tax statute was attacked by a resident taxpayer. The Missouri Supreme Curt in its opinion noted that the plaintiff in that case, being a resident, was not in a position to challenge the non-resident penalty provision. Hence, anything stated by the court with reference to the non-resident penalty provision was dicta. Further, under Section 527.020, RSMo 1959, the appellants would clearly have the right to bring a declaratory judgment action in the state's courts to have the validity of the statute in question determined. This they have not chosen to do.

CONCLUSION.

Appellee, Milton Carpenter, submits that the decision of the three judge Court of the Western District of Missouri, Central Division, dismissing these proceedings should be affirmed in that the required jurisdictional amount is not present; these proceedings did not properly come within the purview of 28 USCA §1343(3); appellants have a plain, speedy and efficient remedy in the Missouri courts; and that the dismissal of these proceedings was a

proper exercise of the Court's discretion. Therefore, appellee prays that the judgment of the lower Court be affirmed, or in the alternative, that appellee's motion to dismiss the appeal be sustained.

Respectfully submitted,

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PROOF OF SERVICE.

I, Albert J. Stephan, Jr., Attorney for Appellee, Milton Carpenter, Director of Revenue for the State of Missouri, appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served a copy of the foregoing by depositing two copies in the United States Mail, with regular postage prepaid, in an envelope addressed to Stanford S. Meyer, 4715 West Main Street, Belleville, Illinois, Attorney for Appellants, on the 4 day of April, 1963.

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